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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

COUNTY OF WASHINGTON, ET AL., *Petitioners,*

v.

ALBERTA GUNTHER, ET AL., *Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS *AMICUS CURIAE*

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## MOTION OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

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American Society for Personnel Administration ("ASPA") moves the Court under Rule 42 for leave to file a brief herein as *amicus curiae.*

ASPA's interest in this case arises from its position as the world's largest association of personnel and industrial relations executives, representing nearly 30,000 professionals in business, government, and education dedicated to the furtherance of personnel and industrial relations management. Accordingly, ASPA and its member have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment.

ASPA has been in the forefront of efforts to professionalize the field of personnel management. With respect to the subject of compensation, ASPA has devoted enormous energy towards increasing the state of the art and the proficiency of compensation managers to accurately and fairly develop compensation systems and plans. ASPA has sponsored seminars on this topic and conducted studies on various compensation issues, including a review of the question of job evaluation and compensation. Central to these efforts is ASPA's belief that professionally developed and administered compensation and job evaluation systems are the surest way to assure equality in the workplace.

Because of ASPA's long involvement in this area, it views with alarm the possible adoption of a judicial theory of "comparable worth" in the context of equal employment opportunity law. Adoption of a comparable worth theory would open the compensation structure of substantially every employer in the country to judicial review. This is a matter of broad concern transcending the immediate interests of the parties to the case at bar. Consideration of this matter from a broader perspective than those of the immediate parties will, it is hoped, be of substantial assistance to the Court.

ASPA therefore seeks leave to file a brief as an *amicus curiae* in the classical traditional sense: not to weigh in on one side or the other, but to try to further "the public interest in the administration of justice," *Universal Oil Co.* v. *Root Refining Co.*, 328 U.S. 575, 581 (1946), by ensuring that the Court is made fully aware of the context of decisions such as that in this case, and is alerted to the startling implications of the "comparable worth" theory. ASPA hopes both that such an exposition may be useful to the Court in

deciding this case, and that the Court may find it appropriate to give the lower courts guidance in this respect. ASPA takes no position on the merits of the case at bar.

Respectfully submitted,

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| MOTION FOR LEAVE TO FILE BRIEF AS *Amicus Curiae* .... | i |
| BRIEF OF *Amicus Curiae* ..... | 1 |
| INTEREST OF THE *Amicus Curiae* ..... | 1 |
| SUMMARY OF ARGUMENT ..... | 1 |
| ARGUMENT ..... | 2 |
| CONCLUSION ..... | 11 |


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## TABLE OF AUTHORITIES


| CASES: | PAGE |
|---|---|
| *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) | 4 |
| *California Brewers Association* v. *Bryant*, 444 U.S. 598 (1980) | 6 |
| *Christensen* v. *State of Iowa*, 563 F.2d 353 (8th Cir. 1977) | 5, 8 n.3 |
| *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974) | 6, 8, 10 |
| *Ensley Branch, NAACP* v. *Seibels*, 14 FEP Cases (BNA) 670 (N.D.Ala. 1977), *affd. in part and revd. in part*, 616 F.2d 812 (5th Cir. 1980) | 4 |
| *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978) | 6 |
| *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), *rehearing denied*, 429 U.S. 1079 (1977) | 3 n.1 |
| *Gerlach* v. *Michigan Bell Tel. Co.*, 448 F.Supp. 1168 (E.D.Mich. 1980) | 8 n.3, 9 |
| *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) | 4 |
| *IUE* v. *Westinghouse Electric Corp.*, 23 FEP Cases (BNA) 588 (3d Cir. 1980), *rehearing denied, pet. for cert. pending*, No. 80-781 | 9 |
| *Lemons* v. *City and County of Denver*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3211 (October 7, 1980) | 4 |
| *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) | 4 |
| *Orr* v. *Frank R. MacNeill & Son, Inc.*, 511 F.2d 166 (5th Cir. 1975) | 10 |
| *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970) | 6 |
| *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970) | 9 |
| *Universal Oil Co.* v. *Root Refining Co.*, 328 U.S. 575 (1946) | ii |
| *Vuyanich* v. *Republic National Bank*, 24 FEP Cases (BNA) 128 (N.D. Texas 1980) | 4 |

## Table of Authorities Continued


STATUTES AND RULES OF COURT: PAGE

29 U.S.C. § 151 ..... 6
29 U.S.C. § 206(d)(1) ..... 7
42 U.S.C. § 2000e-2(a) ..... 2
42 U.S.C. § 2000e-2(h) ..... 8, n.3
Supreme Court Rule 42 ..... i

CONGRESSIONAL MATERIALS:

H.R. 11677, 87th Cong. (1962) ..... 7
108 Cong. Rec. 14767 (July 25, 1962) ..... 7
108 Cong. Rec. 14768 (July 25, 1962) ..... 7, 8
109 Cong. Rec. 9197 (May 23, 1963) ..... 8 n.2
110 Cong. Rec. 7218 (April 8, 1964) ..... 5, 8 n.3

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## BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS *AMICUS CURIAE*

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### INTEREST OF THE *AMICUS CURIAE*

The interest of American Society for Personnel Administration as *amicus curiae* is set forth in the foregoing Motion.

### SUMMARY OF ARGUMENT

The adoption of a "comparable worth" concept is not supported by the statutory language or the legislative history of Title VII. Any endorsement of such a concept by the Court would impede the free functioning of the employment market, in contravention of longstanding Congressional labor policy, and would result in unnecessary judicial entanglement. The Court should take the opportunity afforded by this case to re-

ject the "comparable worth" concept, and in so doing, reaffirm appropriate legislative and judicial standards in the treatment of such cases.

## ARGUMENT

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin." Involved in this case is the question whether it is "discrimination" under this statute for an employer to pay different wage rates for wholly different jobs if the court finds them to be of "comparable worth" — either to the employer subjectively, or in light of an industrial engineering analysis of the components of disparate jobs.

We respectfully urge the Court, whatever ultimate disposition it may make of this case, not to endorse this theory. Its endorsement would inescapably open the compensation structure of substantially every employer in the country to judicial review, with court-ordered and court-supervised restructuring of pay scales in light of the reviewing court's own job evaluations.

Substantially all employers maintain a hierarchy of pay levels. For whatever reasons, a job in one pay level may be predominantly occupied by members of one race or sex, and a wholly different job in a higher pay level may be occupied by members of another race or the other sex. If a person of the first race or sex in the lower-paid job could successfully contend that his job was of "comparable worth" to the higher-paid job, so that his payment at the lower rate while persons of the other group in the other job were paid at the higher rate

was a violation of Title VII, the remedy would have to be to shift the lower-paid job to the higher pay level. (*All* holders of the lower-paid job, of whatever race and sex, present and future, would of course have to be moved to the higher rate; otherwise the remedy would be more directly discriminatory than the original violation. Hence, the remedy would entail moving the entire job permanently into the higher category.) Other jobs or pay levels than the two immediately involved might then have to be adjusted accordingly. The problem might well be further compounded by *other* claims of discrimination, perhaps involving *other* sexual, racial, religious, or national origin groups, as among yet *other* jobs at *other* pay levels. The logical next step would then be the proposition that it is discriminatory for the pay differential between two jobs of concededly different "worth" to be disproportionate to the difference between the "worths," thus requiring an adjustment of those pay scales by the court in the light of its evaluation of the differences. And so on; the possible combinations and ramifications are almost limitless.

The courts — upon whom falls the burden for the enforcement of Title VII[1] — should be loath to enter such a thicket. Nor is this a fanciful "parade of horrors," in light of the evolution of the basic, and seemingly straightforward, concept of "discrimination" into an intricate and highly technical subject often involving duels of experts in the upper reaches of

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[1] It must always be remembered that the Equal Employment Opportunity Commission is not itself an enforcement agency. Though its "guidelines" are often loosely called "regulations," this is a misnomer, for it has no authority to issue substantive regulations. For enforcement of Title VII it must turn to the courts like any other litigant. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-142 (1976).

statistical theory, econometrics, and industrial psychology. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Ensley Branch, NAACP* v. *Seibels*, 14 FEP Cases (BNA) 670 (N.D.Ala. 1977), *affd. in part and revd. in part*. 616 F.2d 812 (5th Cir. 1980). That triers of fact have already been led into such obscure labrinths is itself good reason for courts to be reluctant to embark upon still more novel and untried theories without crystal-clear guidance from Congress. See *Vuyanich* v. *Republic National Bank*, 24 FEP Cases (BNA) 128 (N.D.Texas 1980).

Certainly, nothing in the legislative history of Title VII suggests that it was meant to empower courts to readjust "the economic balance and relationships prevailing in the community among the myriad of positions in the job market." *Lemons* v. *City and County of Denver*, 620 F.2d 228, 229 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3211 (October 7, 1980). The emphasis in the Congressional debate — as in the cases in this Court ever since — was simply that the statute was meant to remove an impendiment to the free functioning of the employment market: to remove "artificial, arbitrary, and unnecessary barriers to employment," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971), "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially" — and it may be added, sexually — "stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973).

Indeed, the legislative history is explicit that Title VII leaves the employer free to structure his business and his operating policies according to his best judgment in the light of economic realities and market conditions,

so long as he provides genuinely equal opportunity of access to economic benefits. Senator Clark pointed out that "the employer may set his qualifications as high as he likes, and may hire, assign, and promote on the basis of test performance," and pointed out further that "nothing in the bill will interfere with merit hiring or merit promotion. The bill simply eliminates consideration of color from the decision to hire or promote." 110 Cong. Rec. 7218 (April 8, 1964). Such assertions of the independence of the employer are wholly inconsistent with any notion that the statute was meant to open an employer's entire pay structure to judicial reconstitution. As the Court of Appeals for the Eighth Circuit put it in *Christensen* v. *State of Iowa,* 563 F.2d 353, 356 (8th Cir. 1977), "nothing in the text and history of Title VII suggest[s] that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. . . . Title VII [does not require] an employer to ignore the market in setting wage rates for genuinely different work classifications."

Any other conclusion would fly in the face of the uniformly expressed public policy that wage scales are to be determined in the marketplace by the free negotiations of the parties, who are best able to evaluate the interplay of the myriad economic factors, shifting from time to time, from place to place, from industry to industry, and from firm to firm, that must enter into such determinations in a free economy. With the one very special exception of the minimum wage laws, federal legislation has been aimed not at interfering with this process or substituting for it, but at removing barriers to its untrammeled functioning. Thus, the National Labor Relations Act is designed to implement the declared "policy of the United States" of eliminating "obstruc-

tions to the free flow of commerce" by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of employment. . . ." 29 U.S.C. § 151. See also *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). The Equal Pay Act was designed to redress "the weaker bargaining position of many women. . . ." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 206 (1974). And Title VII itself, to repeat, was designed to remove the barriers that racial and other prejudice had erected to the access of minority members and women to the free job market. Only last Term, this Court reemphasized that Title VII was enacted "against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom . . . to establish conditions of employment applicable to a particular business or industrial environment." *California Brewers Association* v. *Bryant*, 444 U.S. 598, 608 (1980).

This Court has long recognized the need to exercise restraint in reviewing the substance of employment decisions. It has historically adopted the role of neutral umpire, not substituting its judgment for that of the participants. It has viewed its role in interpreting statutes designed to regulate the workplace as ensuring that the *process* of employment is fair, and has resisted interfering in the *results* of that process. See *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 578 (1978); *H.K. Porter Co.* v. *NLRB, supra,* at 108. Adoption of a "comparable worth" theory under Title VII would signal the abandonment of this prudent policy, and put the courts into the business of evaluating work factors, compensation systems, and the economic decisions of businessmen and unions in an attempt to reorder pay

scales to try to ensure that shifting racial or sexual groups were paid at equivalent or proportionate compensation levels with other groups in different jobs based on judicial determinations as to degrees of "comparability."

"Comparable worth" is not a new issue. Only a year before the passage of Title VII, Congress took a hard look at the morass into which this theory would lead, and decisively rejected the idea that the courts should be thrust into it. The original bills that eventually become the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), adopted a "comparable worth" approach. Thus, Congressman Zelenko, sponsor of H.R. 11677 in the 87th Congress, one of the key parent bills of the Equal Pay Act, described it (referring to a letter from the Secretary of Labor discussing the distinction between "equal" and "comparable") as requiring that " 'work of comparable character' on jobs requiring 'comparable skills.' . . ." must be paid for on an equal nondiscriminatory basis. 108 Cong. Rec. 14768 (July 25, 1962). Congresswoman St. George, stating her fear that the term "comparable" was too nebulous and would allow "tremendous latitude to whoever is to be arbitrator in these disputes," proposed on the House floor an amendment to change the language "work of comparable character" to "equal work." 108 Cong. Rec. 14767 (July 25, 1962). Congressman Landrum concurred, observing that "[i]f, in fact, we want to establish equal pay for equal work, then we ought to say so and not permit the trooping around all over the country of employees of the Labor Department harassing business with their various interpretations of the term 'comparable' when 'equal' is capable of the same definition throughout the United States." 108 Cong. Rec. 14768

(July 25, 1962). Congresswoman St. George's amendment was adopted, and in its version of the bill the Senate later employed similar language.

That bill failed in conference action in the adjournment rush at the end of the 87th Congress. It was reintroduced early in the 88th Congress. In that Congress, even the use of "equal" rather than "comparable" terminology[2] did not allay concerns that the enforcing authority — and therefore the courts — "could be cast in the position of second-guessing the validity of a company's job evaluation system." *Corning Glass Works* v. *Brennan, supra* at 200. Congress accordingly modified the language still further, using language which "ensure[d] that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act." *Id.* at 201.

It is hardly plausible that Congress, only a year after this careful consideration and rejection of "comparable worth" in the Equal Pay Act, would have thrust the courts into that same morass on a far broader scale, *sub silentio* and by implication — especially since, in considering Title VII, Congress's attention was explicitly directed to the Equal Pay Act and an effort was made to harmonize Title VII with it.[3]

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[2] Congressman Goodell emphasized that the change from "comparable" to "equal" reflected the fact that "[w]e do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing,' and evaluate them so they come up to the same skill or point." 109 *Cong. Rec.* 9197 (May 23, 1963).

[3] This effort is reflected in the so-called "Bennett Amendment," 42 U.S.C. § 2000e-2(h), last sentence. Since we do not believe

Finally, adoption of the theory is wholly unnecessary. There is no "loophole" in Title VII which can only be closed by invoking a novel theory of discrimination, nor will rejection of the "comparable worth" theory in any way inhibit the legitimate function of Title VII. An employer who deliberately skewed his wage system to the detriment of a racial or sexual group; that is, setting different compensation levels for functionally equal jobs solely because of the racial or sexual predominance in one of the jobs; or who adopted a pay scale that did not reflect the business necessities of the marketplace and was based on a job evaluation that was not *bona fide* but a mere pretext for invidious discrimination, would be guilty of a violation of Title VII, just as he would be if he adopted with malicious intent under a false pretext of legitimacy any other practice resulting in disparate treatment of a protected group. See *IUE* v. *Westinghouse Electric Corp.*, 23 FEP Cases (BNA) 588, 598-604 (3d Cir. 1980), *rehearing denied, pet. for cert. pending,* No. 80-781, (Van Dusen, J. dissenting); *Gerlach* v. *Michigan Bell Tel. Co., supra; cf. Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970) (Equal Pay Act). This is not to say that every compensation system

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that Title VII was intended to include a "comparable worth" concept in the concept of "discrimination," we do not believe it necessary to address the construction of the Bennett Amendment. See *Christensen* v. *State of Iowa, supra*; *Gerlach* v. *Michigan Bell Tel. Co.*, 448 F.Supp. 1168 (E.D.Mich. 1980). In any event, the Bennett Amendment was not the first manifestation of Congressional intent in this area. Two months prior to the adoption of the Bennett Amendment, Senator Clark, one of the floor managers of Title VII, assured the Senate that "[t]he standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII." 110 *Cong. Rec.* 7218 (April 8, 1964).

would be subject to judicial review to determine if there was "pretextual" discrimination. Rather, as made clear in the Congressional history, the predicate of job equality as determined by Equal Pay Act standards must be met before the examination could begin. *Corning Glass Works* v. *Brennan,* supra; *Orr* v. *Frank R. MacNeill & Son, Inc.,* 511 F.2d 166 (5th Cir. 1975).

## CONCLUSION

We respectfully urge the Court to reject, in this case, any effort to have it endorse the "comparable worth" concept. For it to do so would work a radical change in the personnel policies of American industry and in the historic role of the courts. It would open the door to massive involvement by the federal courts in restructuring and governing one of the most sensitive aspects of the economy. Such a result would be wholly inconsistent with the longstanding policy of Congress in favor of free determination of wage rates in the marketplace. Nothing in Title VII itself or its legislative history suggests that Congress contemplated such a result; quite the contrary. Nor is any such concept needed for the effective enforcement of Title VII.

Respectfully submitted,

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